Cert
CWV

RECEIVED
JUL 26 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-6952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD TUCKER, JR.,

Petitioner

vs.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari
To the Superior Court
of Butts County, Georgia

BRIEF FOR THE RESPONDENT IN OPPOSITION

GEORGE M. WEAVER
Staff Assistant Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

GEORGE M. WEAVER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-2976

10

QUESTIONS PRESENTED

1. HAVE PETITIONER'S CONTENTIONS BEEN PROPERLY PRESENTED FOR REVIEW BY THIS COURT?

2. WERE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED BY INFERENCES FROM THE EVIDENCE MADE BY THE PROSECUTOR IN HIS SENTENCING ARGUMENT?

3. WERE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED BY THE PROSECUTOR'S COMMENT IN HIS SENTENCING ARGUMENT ON PETITIONER'S DELAY UNTIL THE SENTENCING PHASE BEFORE OFFERING EVIDENCE OF HIS INNOCENCE?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

A. PROCEEDINGS IN THE COURT BELOW 1

B. STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

A. PRESENTATION OF ISSUES IN LOWER COURTS 4

B. PROPRIETY OF PROSECUTOR'S SENTENCING ARGUMENT 5

C. COMMENT ON PETITIONER'S FAILURE TO PRESENT EVIDENCE 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

A. Cases

	Page
Bailey v. Ault, 229 Ga. 646 (1972)	4
Brown v. Ricketts, 233 Ga. 809 (1975)	4
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	6
Eagle v. Isaacs, ___ U.S. ___, 102 S.Ct. 1558 (1982)	5
Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982)	7
Henry v. Wainwright, 661 F.2d 56 (Former 5th Cir., Nov. 12, 1981)	2
Lockett v. Ohio, 438 U.S. 586 (1978)	7
Tacon v. Arizona, 410 U.S. 351 (1973)	5
Tucker v. State, 245 Ga. 68 (1980), cert. denied, 449 U.S. 891	1
Wainwright v. Sykes, 433 U.S. 72 (1977)	5
Woodson v. North Carolina, 428 U.S. 153 (1976)	7

B. Statutes

Ga. Code Ann. § 50-127(10)	4
Ga. Code Ann. § 50-127(11)	1
28 U.S.C. § 1257	5

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

On October 12, 1978, petitioner was indicted in the Bibb County, Georgia Superior Court for the murder and kidnapping of Mrs. Edna Sandefur. (Trial Record (R), 3-5). Following his jury trial, petitioner was found guilty of both offenses. (R. 46). After a sentencing trial, petitioner was sentenced to death on both charges. (R. 47-50). The Georgia Supreme Court affirmed his convictions and sentences. Tucker v. State, 245 Ga. 68 (1980), cert. denied, 449 U.S. 891. On June 20, 1980, this Court denied a petition for a writ of certiorari.

On or about March 27, 1981, Jerry A. Drayton, Jr., Esq., filed a petition for a state writ of habeas corpus in the Superior Court of Butts County, Georgia. A hearing was held on May 29, 1981. Although the petition contained 42 numbered paragraphs which made 31 substantive claims for relief, evidence and argument were presented only on the issue of effective assistance of counsel. (Sept. 11, 1981, Order of Butts Superior Court (9/11/81 OR.), 1). In its final order, the court found no violation of petitioner's Sixth and Fourteenth Amendment right to counsel and denied the petition. No appeal was taken from this order within the 30 days allowed by Georgia law. Ga. Code Ann. § 50-127(11).

On or about December 2, 1981, petitioner filed a second petition for a state writ of habeas corpus from the Butts County Superior Court. This second petition raised numerous new issues, but the court permitted the petition to be filed

for the consideration of only one issue: whether Henry v. Wainwright, 661 F.2d 56 (Former 5th Cir., Nov. 12, 1981), which had been decided since the first petition was filed, affected the constitutionality of petitioner's death sentence. (December 4, 1981, Order of Butts Superior Court). On January 29, 1982, the court found that Henry, supra, did not affect petitioner's sentence and denied the petition. (January 29, 1982, Order of Butts Superior Court). Petitioner filed a timely notice of appeal from this order. On March 24, 1982, the Georgia Supreme Court denied an application for a certificate of probable cause to appeal.

B. STATEMENT OF FACTS

The facts established at trial are adequately stated by the Georgia Supreme Court in its opinion. Tucker, supra.

SUMMARY OF ARGUMENT

Petitioner has not properly presented the issues he raises. Because he failed to raise them in his original state habeas petition, neither the Superior Court of Butts County nor the Georgia Supreme Court reached their merits.

Apart from the above question, the issues about the prosecutor's argument do not warrant this Court's attention. The statements about sexual assault were reasonable inferences from properly admitted evidence. There was no improper comment on petitioner's failure to personally testify. Moreover, petitioner waived these issues by his apparently strategic failure to object.

ARGUMENT

A. PRESENTATION OF ISSUES IN LOWER COURTS

The issues petitioner raises here about the prosecutor's sentencing argument were not raised in the Butts Superior Court until his second petition for a state writ of habeas corpus. His first petition mentioned only the prosecutor's argument about the possibility of parole and contended that petitioner's trial counsel was ineffective for not having objected to the comment. (First Pet., para. 27(B)). The other questions petitioner raises here were not even mentioned.

Under Georgia law one may not ordinarily file successive petitions for the writ of habeas corpus. It is provided in Ga. Code Ann. § 50-127(10):

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

Thus, according to the Georgia Supreme Court, "[A] second petition for habeas corpus shall not be allowed where the issues therein raised could have been raised in the first such petition." Brown v. Ricketts, 233 Ga. 809, 811 (1975); see also Bailey v. Ault, 229 Ga. 646 (1972). By failing to find that either of the issues raised in the petition in this Court fell within either exception to the Georgia rule against successive petitions the habeas court implicitly invoked the rule.

Petitioner's failure to properly raise the issues he now makes is a procedural default. Although this is not a federal habeas case, petitioner should be required to show actual prejudice and cause in order to overcome the waiver. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaacs, ___ U.S. ___, 102 S.Ct. 1558 (1982). Petitioner has not suggested that either cause or prejudice exists in this case.

Moreover, these issues are not properly before this Court because due to his procedural default, petitioner, in effect, raises them here for the first time. This Court has consistently held that federal constitutional issues raised for the first time on appeal from a state court decision will not be reviewed. Cardinale v. Louisiana, 394 U.S. 437 (1969). Tacon v. Arizona, 410 U.S. 351 (1973); see also 28 U.S.C. § 1257.

Assuming that the issues have been properly presented, respondent will address their merits.

B. PROPRIETY OF PROSECUTOR'S SENTENCING ARGUMENT

Petitioner lists several statements by the district attorney made in argument during the sentencing phase of his trial, which he contends denied him certain constitutional rights. By excerpting parts of the argument, petitioner has distorted the argument. The district attorney's complete statement about the possibility of sexual assault was as follows:

> During the course of the main case there was not a great deal of evidence that you could consider about whether or not Mrs. Sandefur was sexually assaulted, but additional things have come in since that time and I think that you can

> consider the fact that she was unclothed and the fact that he says at one point she was on her knees. I think you can consider--I think you consider this history right here: On the 25th day of December, 1964, Christmas Day, Richard Tucker did unlawfully and with force and arms feloniously break and enter into the dwelling house of Catherine Jackson with intent to commit a felony, to wit: rape. I think you can consider the medium brown pubic hair that was found on his clothing, and I think in your own mind you should be settled that this Defendant not only killed Edna Sandefur--and I hate to say this with the family sitting in the courtroom because I know they don't want to believe this; they don't want to believe the type of punishment that this Defendant imposed on their mother or their wife--but I think in your own mind you should be settled now by knowing that this man is a rapist and a murderer, that he forced Mrs. Sandefur to commit acts of oral sodomy on him and that he committed the offense of rape. That's the reason she was unclothed, not this nonsense about fingerprints on clothing.

It is obvious that these statements were based on admitted evidence: A brown caucasian public hair found on petitioner's clothing (T. 627-29, 632, 639, 649); that petitioner made the victim kneel before killing her (T. 515); that she was forced to undress (T. 325-27, 370, 374, 818-19, 876); and that petitioner had previously committed a burglary with intent to rape. (T. 796-97, 847-48, 856, 861, 865). The evidence of the previous crime was, of course, admitted only during the sentencing phase. A conclusive determination as to whether there had been a sexual assault could not be made because of the advanced decomposition of the victim's body. (T. 384).

Obviously, the district attorney's inference of rape was reasonable and did not render his trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). That petitioner's counsel finds the inference unpleasant or strained is of no importance. It should be remembered that the Court

has repeatedly emphasized the importance of capital sentencers considering all relevant facts. See Woodson v. North Carolina, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982). The Georgia provision permitting the introduction of prior convictions, under which petitioner's prior conviction for burglary with intent to rape was admitted, is in keeping with the open-ended nature of capital sentencing proceedings.

Petitioner also complains of the prosecutor's statement about having viewed the decomposed body. This could not have harmed petitioner because extensive photographic and testimonial evidence of decomposition had already been admitted. (T. 372-90).

It should be pointed out that petitioner failed to object to any part of the prosecutor's sentencing argument. This failure was apparently part of his strategy: His counsel then in closing attacked the prosecution for what he thought to be overreaching. (T. 903-06). Petitioner's counsel tried to create sympathy for his client through this means. Moreover, petitioner has certainly failed to show cause and actual prejudice by virtue of the prosecutor's statements. Engle, supra.

C. COMMENT ON PETITIONER'S FAILURE TO PRESENT EVIDENCE

Petitioner contends that the district attorney improperly commented in the sentencing phase on his failure to testify in the guilt/innocence phase of his trial. For these reasons certiorari should not be granted on this issue. First, the district attorney's point was really that petitioner offered no evidence during the guilt/innocence phase (T. 720), and yet in the sentencing phase testified that he was, at best, an accomplice of the real killer. It is not a comment on the silence of a defendant to refer to his failure to offer evidence.

Second, the authority cited by petitioner has to do with the use of a criminal defendant's failure to testify in order to prove his guilt. Instant petitioner had already been found guilty when the questioned statement was made.

Third, petitioner failed to object to the statement by the prosecutor. Thus, for the reasons urged above with regard to the other comments by the district attorney, the death sentence should not be disturbed.

CONCLUSION

The instant petition should not be granted because the Supreme Court of Georgia has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. S. Ct. Rules 17.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

Please serve:

GEORGE M. WEAVER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-2976

Marion O. Gordon
MARION O. GORDON
Senior Assistant
Attorney General

John C. Walden
JOHN C. WALDEN
Senior Assistant
Attorney General

George M. Weaver
GEORGE M. WEAVER
Staff Assistant
Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-6952

RICHARD TUCKER, JR.,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, George M. Weaver, a Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on July 22, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

George M. Weaver

GEORGE M. WEAVER

Sworn to and subscribed before me

this 22 day of July, 1982.

NOTARY PUBLIC

My Commission Expires: